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DEC 23 1963
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 435

ARTHUR LEVINE, *Petitioner*

v.

EMILY KATHRYN LACY, *Respondent*

PETITION FOR REHEARING FROM THE DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

JOHN A. BECK
605 Southern Building
Washington 5, D. C.

A. ANDREW GIANGRECO
120 South Royal Street
Alexandria, Virginia

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petition for Writ of Certiorari to the Supreme Court of Appeals of Virginia

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PETITION FOR REHEARING

Petitioner presents its petition for a rehearing of this Court's order dated December 2, 1963, denying the petition for a writ of certiorari to the Supreme Court of Appeals of Virginia, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

Where the District Court clearly had jurisdiction of a case removed from the State Court, and the order of remand was based upon a procedural defect, the Federal Removal Statute would require the State Court to give sufficient effect to petitioner's answer, counterclaim and reply thereto, filed in the District Court, to avoid the entry of a default against the petitioner, without notice, upon remand to the State Court.

Upon petitioner's filing of his petition for removal, on March 9, 1961, the District Court undoubtedly assumed jurisdiction of this case. The test of the jurisdiction of the District Court, upon removal, is the same as the standard of its original jurisdiction. Here there is no dispute that diversity of citizenship and the required amount in controversy existed. 28 U.S.C.A. 1441.

The order of remand from the District Court to the State Court on September 26, 1961, was based upon petitioner's failure to file his petition for removal within 20 days after service upon the Virginia Commissioner of Motor Vehicles. The requirement that the petition for removal be filed within 20 days after petitioner's receipt of the suit papers, by service or otherwise, is a statutory *procedural* requirement and does not affect the jurisdiction of the District Court. 28 U.S.C.A. 1446 (b) *Parks* v. *New York Times Co.*, D.C. Ala. 1961, 195 F. Supp. 919; *Seigler* v. *American Surety Co. of N. Y.*, D.C. Calif. 1956, 151 F. Supp. 556; *Fisher* v. *Exico Co.*, D.C. N.Y. 1952, 13 F.R.D. 195; *Green* v. *Zuck*, D.C. N.Y. 1955, 133 F. Supp. 436.

In this case the District Court had active jurisdiction for a period in excess of six months. During that time petitioner filed a timely answer and counterclaim and the respondent filed a reply thereto in the District

Court. Whether the State Court continued to have concurrent dormant jurisdiction in the case during this period is questionable. However, the Federal Removal Statute does direct that upon removal the State Court shall proceed no further unless and until the case is remanded. 28 U.S.C.A. 1446 (e). In the event of a remand, the State Court then may proceed with the case. 28 U.S.C.A. 1447 (c).

When the District Court assumes jurisdiction of a removed cause, it takes the case in the posture that it existed in the State Court at the time of the filing of the petition for removal. *Ultronic Systems Corp. v. Ultronix Inc.*, D.C. Del. 1963, 217 F. Supp. 89. If there are any jurisdictional or procedural defects in the case as it comes from the State Court, the parties may pursue them in the District Court. There is no doubt that respondent could have sought a default judgment against the petitioner for failure to file a timely answer, in the District Court. *Anderson* v. *Penncraft Tool Co.*, D.C. Ill. 1961, 200 F. Supp. 145; *Springs Cotton Mills* v. *Machinecraft, Inc.*, D.C. S.C. 1957, 156 F. Supp. 372; *Abraham Land and Mineral Co.* v. *Marble Savings Bank*, D.C. La. 1940, 35 F. Supp. 500. Instead, respondent filed a reply to petitioner's counterclaim and made no mention of a claim for default, occurring in the State Court prior to removal, until the case was remanded to the State Court.[1] The Federal Removal Statute, although giving uniformly to procedures for the removal of a case from the State to the District Court, offers no guide as to the status of the case upon remand to the State Court. In the

[1] An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise. 28 U.S.C.A. 1447 (d).

instant case the State Court rules[2] do not provide a procedure for cases where there has been a substantial time gap in the active jurisdiction of the State Court.

It is respectfully submitted that a reasonable construction and application of the Federal Removal Statute would require the State Court upon remand to give sufficient effect to the pleadings and proceedings in the District Court, the only Court having active jurisdiction over the case at the time of filing of such pleadings and proceedings, to avoid the immediate entry of a default judgment, without notice. To apply the Federal Removal Statute differently would do violence to our constitutional guarantees of due process[3] and result in manifest injustice.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the Supreme Court of Appeals of Virginia.

JOHN A. BECK
605 Southern Building
Washington 5, D. C.

A. ANDREW GIANGRECO
120 South Royal Street
Alexandria, Virginia

Attorneys for Petitioner

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[2] Rules of the Supreme Court of Appeals of Virginia, governing actions at law.

[3] See comments of Mr. Justice Black to this Court's order of December 2, 1963, denying the petition for certiorari.

Certificate of Counsel

We, John A. Beck and A. Andrew Giangreco, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

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